THE PROBLEM OF REFORMING JUDICIAL ADMINISTRATION IN AMERICA.*

III. The Problem of Reforming the Courts.

THE operation of our courts is so essentially a part of the law itself, the whole system of positive law which constitutes common law jurisprudence, that no plan of court reform can be formulated without first delimiting the portion of judicial operations which it is proposed to affect under the plan of reform; since it is probably the smaller portion of the court's functions. And to do this intelligently, it is well to review the whole field of the court's functions.

The first and oldest function of the courts, which was the duty of the earliest courts, was to decide altercations and causes between the parties plaintiff and defendant. In the archaic period of our English or Teutonic law this was no doubt their only function. Sir Henry Maine says:

> "The earliest notion of law is not an enunciation of a principle, but a judgment in a particular case. When pronounced, in the early ages, by a king, it was assumed to be the result of a direct divine inspiration. Afterward came the notion of a custom which a judgment affirms, or punishes its breach. In the outset, however, the only authoritative statement of right and wrong is a judicial sentence rendered after the facts have occurred. It does not presuppose a law to have been violated, but is breathed for the first time by a higher power into the judge's mind at the moment of adjudication." [1]

And even in the historic period, after the archaic conception of judicial inspiration had disappeared and the foundations of modern law were being laid, those foundations were laid in pursuance of the plan, under the English system at least, that

*Editorial Note.—This is the third article by the author on this subject. The first of the series appeared in Virginia Law Review for January, 1914, and the second in Virginia Law Review for October, 1915.

[1] Ancient Law, Introduction, xv.

litigation was purely *inter partes*. Every common law writ was so drawn and so enforced, and is still so enforced to this day. It is with the utmost delight that discriminating readers and pleaders point out the undeniable facts that the decision of an action, even where a statute is involved, actually binds no one, not even the judge himself, in the decision of a subsequent case upon similar facts. A new case must be decided again, although the proof involves but the introduction of the same evidence.

But consistency is a principle of the educated mind; and while it may be recognized as an *a posteriori* conception springing from an impulse and desire to prepare the lawgiver or judge against future criticism, it is so clearly a part of the mental organization of civilized man, as to be inculcated by his conscience. Therefore we can well understand how the decision of the first altercation reached by a judge after an honest effort to distinguish between right and wrong, would be availed of by him as a basis for the decision of a subsequent case. And of course, this is but the first stone in the construction of a legal principle.

We must realize too, that popular customs long antedated the organization of courts; and that among the earliest instances of the acceptance of the peaceful settlement of disputes by courts in lieu of the savage plan of personal battle, were cases which involved the mere declaration of customs. Glanville said in his preface that "each decision is governed by the laws of the realm, and by those customs which, founded on reason in their introduction, have for a long time prevailed."

But a custom is only the adoption by human minds of a principle of action, however simple, and the recognition of some necessity for it. So if it is a mark of mankind in general to act in the same way under the same circumstances, and to recognize the duty and the right to do so, it becomes conducive to public order for the judges not only to recognize popular customs as the basis of their decisions, but also to establish customs in reaching the decisions themselves. The judicial decisions of judges are but a part of their mental experiences, and that all men, including judges, are directed by their experiences is a fundamental fact in human biology.

The extension of the judicial functions from the mere arbitrament of individual causes to the creation of legal principles, was a natural and correct development. And while legal rights and duties springing from principles of merely judicial creation, have not always the same clear demarcations as rights and duties dependant on statutes or imperial orders, all students of jurisprudence must admit that they are of the same validity.

Therefore a second function of courts is to formulate legal principles; or to state the function simply, to make law; for it is impossible to escape the conclusion that the courts make law just as the legislatures make law. John Austin accurately demonstrated that they are subordinate law-making authorities under the recognized supreme authority in the state; and whether the law they create stands out clearly, as when they make a generally recognized popular custom a legal right,[2] or whether it merely results from the extension of an old legal principle to a newly encountered and slightly varying congeries of facts, the judicial function is the same. The making of law is as much a part of the history of all courts, and just as fundamental a function of courts, as the settlement of disputes. Indeed considered as a social institution, it is perhaps of deeper significance. Certainly the accomplishment of court reform is impossible without carefully guarding and preserving it.

A third important function of the courts is that of interpreting the laws enacted or promulgated by other law making bodies. The exercise of this function and power involves, of course, the interpretation of prior court decisions, as well as the interpretation of laws or statutes enacted by the supreme law giving authority. It involves also the interpretation of popular customs when they are being adopted by the courts as judicially made laws. But the interpretation of former court decisions and the interpretation of customs are rather steps in the making of law by the courts than their exercise of the function of interpretation as a function separate from the other powers of courts.

It is apparent on reflection that the function of law making and the function of interpretation are so closely allied as to be

[2] Cf. Austin, Jurisprudence, Lecture XXX.

in most concrete cases inseparable. Thus, it is generally impracticable to interpret a statute, or other definitely prescribed positive law without adding something to its probable meaning; and to that extent the court in exercising its function of interpretation is also exercising its function and power to make positive law.[3] For the purpose of reasoning, however, it is possible to separate clearly the function of law making from the function of interpretation, and to identify the latter function separately as the power and duty of the courts to define and declare the exact meaning and scope of those positive laws ordained by all other law making authorities. For the exercise of this power the courts in all free societies are given the ultimate authority. This function is defined by Austin in these accurate terms, "The discovery of the law which the lawgiver intended to establish, is the object of genuine interpretation: or (changing the phrase), its object is the discovery of the intention with which he constructed the statute, or of the sense which he attached to the words wherein the statute is expressed."

Under the American federal Constitution and under most of the state constitutions written during the early part of the nineteenth century, the courts' function of interpretation was much better protected than under the more recent state constitutions, by reason of the independence developed in the judiciary from life tenure. An unswerving search after the true meaning of the constitution itself was more easily inculcated in a judge whose seat was practically permanent than in one whose interpretations might be the cause of his losing his seat at repeated stated periods. It is a principle of interpretation in English speaking countries, and probably in all countries also whose laws are founded on written constitutions, that constitutions and fundamental laws like them shall be construed according to the meaning of the words of the law when they were adopted. And of course, the reason for this rule is that without it there could be no standard of interpretation at all.[4] But to identify one

[3] Cf. Austin's "Note on Interpretation, Proper and Improper," Austin, Jurisprudence, Vol. III.

[4] See Slaughter House Cases, 16 Wall. 36 (1873); Civil Rights Case, 109 U. S. 3 (1883).

of the worst effects upon American law of the now almost universal constitutional provision of the popular election of judges, it is only necessary to trace the decisions of the state courts upon the meaning of clauses in the various constitutions limiting or conferring popular rights. One of the most conspicuous instances of these clauses which have been enlarged to meet popular desire is that including the phrase, "life, liberty, and property," occurring in almost all the state constitutions. They were incorporated in the federal Constitution, first in the fifth amendment, and again in the fourteenth; and although with various dissenting opinions, were held to mean no more than they said, that is, to protect personal, physical liberty and tangible property.[5] But in New York, under the clause of their Bill of Rights protecting life, liberty, and property, "property" soon began to mean "the use of property," [6] and "liberty" came to mean "the right of man to be free in the enjoyment of the faculties with which he has been endowed by his creator." [7] And now probably in all the states the guaranty of life, liberty, and property assures the citizen of very broad civil rights.

The fourth and last important function of the courts is to administer the laws. But by administering the laws, is not meant the enforcement of them. Courts cannot enforce the laws in the sense of compelling the litigants to obey them. After determining the duties of the several litigants, or the amercements which should be made by certain of them for the benefit of others, courts direct the parties what they should do, and on their failure to comply with the directions, put into operation the machinery provided by the executive governing power to enforce obedience or penalties.

It is important to bear this distinction in mind; for the public

[5] The beginner in the study of Roman Law is shocked to find, however, that this rule did not obtain in the development of the Jus Gentium and the later system of the law of Rome from the Jus Civile, or law at the time of the Twelve Tables. The strict law of the Twelve Tables was avoided, although positively asserted to be binding, by absurd misconstructions of its meaning to meet changing conditions. See any history of Roman Law. But this leads us straight into the origin of legal fictions, and back into judge made law, and is out of place here.

[6] *In re* the Application of Jacobs, 98 N. Y. 98 (1885).

[7] People *v.* Marx, 99 N. Y. 377 (1885).

inadvisedly often complain of the judical system provided for them by reason only of the fact that the system of enforcement provided by the state is inherently defective in its operation. The enforcement of all the judgments and decrees of our courts is accomplished through a sheriff, or similar officer; and the sheriff is classed under the constitutions as a member of the executive department of the government. He is the executive arm of localized government during peace, as the military is the executive arm of localized government during riot or war.

The administrative function of courts may be sufficiently defined as their power and duty to apply the body of laws obtaining in the territory over which they have jurisdiction to the actions and transactions or the abstract rights of the persons brought to their attention; the courts' conclusions in each case being certified by them to the executive authorities for enforcement.[8] The decrees of court are usually rendered against persons actually before them, but under certain circumstances they merely fix the status of inanimate things brought within the reach of the executive authorities who are to enforce the decrees.

The administrative function of courts is exercised under a separate system of rules, either prescribed by a higher law making authority, or adopted by the courts themselves, and commonly known as rules of procedure; and the body of laws is applied in whole or in part according to the limits of jurisdiction of the individual courts.

It is difficult to determine exactly when the administrative function begins and where it ends. Perhaps the only truly administrative act of the court is the certification of its judgment or decree to the executive power to enforce. But as the whole proceeding is broadly speaking the administration of justice, it must all be included in the administrative duties of the courts.

There are other definite functions of courts the identification of which would be both interesting and helpful as a preliminary work to attempting any substantial reform. For instance, every

[8] It is not attempted to embrace in this definition the functions of consular courts.

well organized and ably manned court has the pronounced function of inculcating a general respect for law. It goes far toward establishing the reign of law; which is the ultimate aim of civilized society. By no means every infraction of personal rights can be brought before the courts for correction; and if the respect for the courts is fully established in the community, by the recognition of their efficiency, the recognition of the correctness and impartiality of their judgments, as well as by the general recognition of the certainty of the execution of their punishments and amercements, the number and extent of the infractions of law which are not brought before the courts will be greatly reduced.

This general respect for the courts is induced, not only by the ability and purity of the personnel of the judges, not only by the efficiency of the executive branch of the government assigned to enforce the judicial decrees, but also, and to a very great extent, by the mysterious dignity of the courts. The scarlet gown and flowing wig of the Lord Chief Justice of England, the black robes of the Justices of the Supreme Court of the United States, greatly increase the weight of their decrees; and every habit or institution which tends to reduce the courts to the level of the litigants and the public over whom they hold sway tends to hamper their exercise of the function we are now considering—the production and maintenance of a general respect for law.

It would seem that this function of the courts has been overlooked by some of our most thoughtful reformers in their suggestions for disciplining judges for neglect of their duties. Various plans have been suggested for the imposition upon them of penalties proportioned to the importance of the neglect or omissions of duty of which judges are not infrequently guilty.

It may well be believed that such suggestions come from the professors of the law schools, rather than from those who come in close touch with the courts. Certainly the idea smacks of the schoolroom. Every barrister ought to know that no system of punishments can be meted out to the judges, short of removal from the bench, without utterly demoralizing the popular regard for the dignity of the courts; and that it is far better to stand

the shortcomings of the judges than to recognize that they are as human as the public.

It is evident from the foregoing cursory review of the courts that a very large portion of them are constructive in the relation they bear to society and government; and that as such they must be contemplated, and any reform of them considered, quite differently from those functions which may be classed as administrative.

The power and duty of the courts to make law, and their opportunity and duty to create and maintain the domination of law, are purely constructive functions; while their power and duty to set in motion the executive arm of the government to enforce law, and their power and duty to settle altercations between litigants are administrative functions; although the latter function, if taken strictly and perhaps correctly, should be limited to the decisions of disputes where the award is accepted and voluntarily complied with by the litigants, and as such is hardly administrative. It is more nearly related to the function of interpreting positive laws made by other or higher law making bodies—a function neither administrative, nor purely constructive, but rather pertaining to absolute sovereignty.

Thus by analysis of the conception of a court and its functions, even though the analysis be as superficial as the preceding, we are led unconsciously to a realization of the impracticability of solving the problem of reforming the courts and the general administration of the laws without a thorough study of their history and the history of the governmental institutions of mankind. The origin of the English courts—and the English courts and the English system of law are most valuable to us, not so much because American courts developed from them, as because their history is younger and can be more accurately traced than those of Rome—the origin of English Courts, as everyone knows, was in the realization by the Kings of the practical necessity to designate definite places where litigants might come to have their disputes determined, and their unquestionable rights enforced by royal authority. These courts, from the fact that they were deputized agencies of the King's

authority, from the beginning exercised functions largely administrative. All other judicial authority was reserved to the King; and except as it was gradually wrenched from him by the growing strength of the barons and in time by the people in their parliament, the King could judge and award justice as he chose or as his conscience might dictate. Hence when the period of the chancellors arrived, and the King turned over his conscience to them, the notion was accepted that equity was above the law. And the notion was historically correct.

But it is unnecessary to pursue the analysis further. Suffice it to say that almost all the discussions upon the subject of reforming the courts, and all the recent plans of reforms presented for professional and general consideration have been directed to the improvement and reform of the exercise of the administrative functions by the courts. And it is to draw attention to the other important functions of the courts, and to explain the necessity to bear them in mind in adopting any reform, and in general to leave them alone, when designing reforms of the administrative function only, that this analysis has been attempted.

Before passing, however, to the usually considered phases of the problem, it is important to note one point for reform which affects almost equally the constructive and the administrative functions of the courts; which is calling for the earliest attention. Until we shall have provided a code in the true sense of the term,[9] the reported decisions of the courts remain our most important source of the law. By an accidental development of legal history, which it is not important now to trace, the opinions of the courts in America, almost from the very beginning of our courts, have been delivered in writing. For the first fifty years or more of our courts' existence, this adoption of written opinions was no doubt an advantage. If the opinions had been merely oral, as they have always been in England, their accurate preservation and transmission would have been difficult if not impossible for lack of a sufficiently paid corps of reporters, and the increased length of the written

[9] For an explanation of what such a code is, see the preceding article on the Problem of Reforming the Law, 3 VA. L. REV. 1.

opinions was not an objection. The provincial law libraries were not burdened with a superfluity of law books anyway.

But with the increase in litigation, and the greatly increased number of authorities to be cited and discussed by the courts, the American written opinions have become protracted essays; and without criticising their perspicacity, or the discretion with which they are compiled, their length alone has become a great embarrassment in the enforcement of law. The accumulated mass of reported matter in most of the older states has become as great as that which represents six hundred years work of the courts of England, and has preserved inapt expressions of opinion which may affect uninstructively any subject brought before the courts for decision, even though the real question involved may never have come up for decision before.

Thus the written opinions have become a curse, rather than a benefit, and constitute our most impelling force to the compilation of the law into more definite, even if too hastily drawn statutes.

Without waiting until the law of the several states can be systematically codified, as suggested in the preceding article,[10] there is no reason why the increase of law matter should not be checked by the abolition of written opinions and the adoption in each state of a corps of legalized reporters who can reduce the oral decisions of Supreme Courts to writing, or write them under the direction of the courts, having in view the value of the subject-matter and the necessity or uselessness of its permanent preservation.

Probably the greatest obstacle to our obtaining such relief is, the modern systems of private reporters, who pride themselves upon publishing all the unimportant matter unavoidably emitted by the higher courts. Thus, they drag it from the waste baskets and press it upon the bar, who preserve it for fear of its containing some expressions of the upper court, however unimportant, capable of affecting a decision of the courts below. And what one lawyer may have all are compelled to acquire.

Passing now to a consideration of the problem of reforming and rendering more efficient the exercise by the courts of their

[10] The Problem of Reforming the Law, 3 VA. L. REV. 1.

administrative function, which, as was observed above, may be taken broadly to include the entire process of considering and deciding litigation up to the rendition of the judgments or decrees, it may be noted that the problem resolves itself into the consideration, first, of improving the personnel of the courts by changing the method of the selection and retirement of the judges; second, reforming the jurisdiction and organization of the courts; and third, reforming the methods of judicial administration in the strict sense of the term; which will be more fully explained later.

The consideration of the problem of reforming court procedure in the strict or limited sense of the rules set for litigants to observe in the presentation of causes, although highly germane, is too large to be considered in connection with the other phases of the problem of reforming the courts; and so will be postponed to a later separate article.

The problem of reforming the administration of the courts has been the subject of much study and conference by the directors and council of the American Judicature Society, a philanthropic association organized some three or four years ago under a private beneficence, "to promote the efficient administration of justice," and to give the benefit of scientific and trained knowledge on the subjects involved to practical reformers and legislative committees anywhere in the country.

The society is localized in a sense in Chicago, because its office is there and most of its board of directors are taken from the circle of law scholars who reside in that city.[11] But the society has a corresponding membership or council consisting of lawyers and judges selected from each state of the Union;

[11] The Board of Directors of the American Judicature Society are Judge Harry Olson, Chief Justice of the Municipal Court of Chicago, Chairman, Governor W. N. Ferris, of Michigan, Prof. James Parker Hall, Dean of the Law School of the University of Chicago, Prof. Edward W. Hinton, of the University of Chicago Law School, Prof. John H. Wigmore, Dean of Northwestern University Law School, Prof Albert M. Kales, of Northwestern University Law School, Prof. Roscoc Pound, Dean of the Harvard Law School, Judge John B. Winslow, Chief Justice of Wisconsin, F. B. Johnstone, Esq., and Nathan W. McChesney, Esq., of the Chicago Bar, F. W. Lehmann, Esq., of the St. Louis Bar, and Herbert Harley, Esq., Sec. of the Society.

and so the society's conclusions and recommendations are affected by carefully considered opinion and criticism from every section.

The society has published so far about a dozen bulletins, consisting of discussions and criticisms of the existing systems of judicial administration in America, together with recommendations for its reform; and for the aid of legislators the society has issued several complete model bills to be enacted into laws, where complete reform of the courts is in contemplation, prefaced by proposed constitutional amendments necessary in most instances, as the model bills generally conflict with details in existing state constitutions.

It is to be regretted that this work of the American Judicature Society is not accessible to everyone who would be interested in reading it. If it were, this article might have ended with the preliminary analysis of the subject, for any ideas which it contains upon administrative reform are suggested in the work of the Judicature Society, even if not recommended by it; and few if any suggestions for reform are of practical value in jurisdictions with which the critic is unfamiliar, except as ideas and warnings to constructive students in the locality.

But while the bulletins of the American Judicature Society are no doubt to be found on file in all law libraries of any importance, many of them are already out of print, and so their contents must be further scattered at second hand.

The subject of reforming the methods of selecting and retiring our judges, has been very much affected by the study of the society, based upon the experience of the less conservative states in the far West. Up to a year or so ago, no proposed reform in government so awoke the ire of conservative students of government as the growing popular demand for the recall of judges. It was dreaded as the acme of destructive socialism. And so it was, in so far as it represented aims of the social philosophy of its originators.

But while the forensic contest for and against it was at its height, not a few reflective students noted that the already universal plan of popular election of the judges involved the much dreaded judicial recall in its worst form—the recall of the

judge from his position on the bench for no reason whatever but popular dislike for his decisions, or worse still, for his mere personality; whereas the proposed socialistic substitute in nearly every proposed form required the statement or at least the general recognition of some logical reason for the popular disapproval.

Experience and study have approved the accuracy of this observation; and now few deny that if the personnel of the courts is to be subject to the will of the whole electorate, the recall is the best method by which they should be allowed to exercise their power.

It is true that the original advocates of judicial recall and the framers of the constitutions in those states which have recently adopted it, invented it as an instrument of control by the public over the courts additional to the control already possessed through the popular election of the judges. And it is also true that most of those statesmen who inveighed against it advocated at the same time the abolition of the popular election of judges, and the return to the older system of executive appointment for definite terms of office or for tenure coincident with the appointees' good behavior.

But to deprive the general electorate of all control over the personnel of the courts is recognized by all practical reformers as impossible. The people never give up entirely a power which they have once possessed. Indeed they rarely ever relax their hold.[12] So if they can be persuaded by reformers to accept some plan of judicial appointment supplemented by the creation of a liberal power of recall, it is believed that the abolition of the present absurd plan of the popular election of judges may be accomplished.

The latest conclusion of the American Judicature Society seems to be that the chief justice of the highest court in the state, and also of the unified courts in each metropolitan community, should be chosen by the entire electorate over which he

[12] The votes of the British electorate in the middle nineties sustaining the House of Lords in their rejection of the Liberal Home Rule Bill, thus checking for a time the growth of power of the House of Commons was evidently but an apparent instance to the contrary.

has jurisdiction for a term neither too long to make him unmindful of public approval, nor too short to make the office worth the strain of repeated campaigns; and that he should be given the absolute power of selection and appointment of all the other judges of his court whose positions become vacant during his occupancy of the chief justiceship; that at stated periods, say at the expiration of three years, at the expiration of nine years, and at the expiration of eighteen years from the date of appointment of each of these judges, the question should be submitted to the entire electorate with reference to the judges who have been sitting for those periods respectively, "Shall the judge be retained?" If the result of the election is in the negative, the judge so rejected is dropped, and the chief justice appoints someone else to fill the vacancy.[13]

It requires little analysis of our present system of election of judges to see that its greatest evil is traceable to the fact that the elections involve the recall and the replacement of the judges at the same time; whereas if the electorate were allowed to decide at an election merely whether or not they are dissatisfied with the judge or judges in question and wish to depose him, their decision would be much more rationally exercised.

It is absolutely necessary, if the strength and integrity of our judiciary is to be maintained, that the present campaign rivalry between judges on the bench and candidates for their positions in the election shall be stopped. In the South we have not generally suffered so far as in the great cities of the North from control of judicial elections by political machines; but we are suffering just as much as the North from the utter ignorance of a majority of the voters of the fitness or unfitness of the candidate seeking to displace the judges on the bench, and almost as much from the prejudices incident to all party and factional general elections and primaries against the judges already on the bench. This latter source of danger, of course, cannot be eliminated from any election upon the judgeships, even that proposed by the above plan. But it can be reduced to the minimum, if as

[13] See Bulletin IV A of the American Judicature Society, and also the essay by Prof. Albert M. Kales on "Methods of Selecting and Retiring Judges," in Bulletin VI.

the Judicature Society propose, the elections on the retention of the judges are held at different times from elections on other offices. The pressing necessity in all the growing and already populous communities today, both South and North, is to devise some plan by which generally satisfactory judges who desire to remain on the bench shall not be displaced by opponents elected by their industry rather than because of the unfitness of the incumbents. And experience shows that such a result is especially likely to be accomplished when the encumbent is an appointee to fill a judicial vacancy, and has not been upon the bench long enough before the election to enable the electorate to know whether he is likely to make, or even whether he is making, a good judge or not.

Most lawyers, certainly most lawyers who are judicially inclined, have not accumulated much property by the time of life when they should be put upon the bench if the bench is to get the benefit of their best years of work. They are still living as a rule upon the proceeds of their law practice. Under the present system of elections, for them to renounce their practice and go upon the bench, especially by appointment, involves the probability of having to begin professional life over again at the bottom, if they shall be displaced before having been able to save enough for old age. As a result the best type of younger lawyers as a rule are loath to offer for judgeship. If a practicable change is made by which the judgeships shall be filled by appointment, the evils incident to their removal by popular vote may well be tolerated; for experience in the West is already proving that the removal of judges by recall is indeed rare. Certainly there will be much less difficulty in getting strong young men to accept judicial position, for most of them will be confident that they are capable of success if they cannot be removed without cause.

There is of course a good deal of doubtful matter in the Judicature Society's model act, such as the limitation upon the discretion of the chief justice in making his appointments by naming the years of practice a lawyer must have had before being eligible for appointment to the bench, and the division of the judges into seniors and juniors, based upon their years of

practice and judicial experience rather than mere official precedence. Their salaries are also graded to some extent by their length of service.

All these provisions smack of the class room, and will hardly stand the test of experience. They are referred to here merely to enable readers who have not seen the proposed acts to get the benefit of the suggestions. But the bench, like the bar, must be graded chiefly on strength and proficiency; and it is well to recollect that the greatest common law judge in England during the last half of the nineteenth century was appointed to the Queen's Bench before he had attained the rank at the bar entitling him to wear a silk gown.[14]

The strength of the proposed reform lies in its apparently harmonizing the hitherto assumed inconsistency between the old plan of judicial appointment and the modern demand for popular control. Its weakness lies in the popular election of the chief justice himself, and for a comparatively short term. But those provisions seem necessary to keep the courts under the control of the electorate; and the short term is also necessary to prevent the chief justice from having to appoint too many of the judges during one term of his office. And even if a chief justice of meagre abilities is elected, the duty of filling the vacancies in the other judgeships will make him feel responsibility for the efficiency of his court; and if he has any pride and honesty of purpose, will impel him to select as his appointees men of better ability than his own; for most lawyers know their own limitations at least as well as their critics around them.

It has been further recommended that the appointive judges be made subject to recall at any time for proper causes,—such causes as would be grounds for their impeachment, for instance; for removal by impeachment also is of course retained as a historic necessity. But while the unlimited right of recall if granted as the basis of trade with the electorate to reduce the release of its present right of election, would not be too much to pay in the light of recent experience, if it is possible to se-

[14] Reference is made to Colin (afterwards Lord) Blackburn, who was appointed by Lord Chancellor Campbell a justice of the Queen's Bench when little more than a beginner in the practice.

cure the desired reform with the right of recall limited to definite periods, the interests of the public would seem abundantly protected in the premises.

Let us then pass to the second division of the discussion of administrative reform—reforming the jurisdiction and organization of the courts.

As yet no American state has modernized the jurisdiction and organization of its courts, as compared with England, which has set the standard. Many of the states have made radical changes in their judicial systems from what they were when first instituted in substantial imitation of the old judicial system of England; and a very few have recently made rough attempts at modernizing the system. For instance, the Alabama Legislature of 1915 has consolidated the superior courts throughout the state into a circuit court of law and equity for each county, and has given the Chief Justice of the Supreme Court control of the time of all circuit judges by empowering him to shift them from county to county as the variations of judicial business may demand. But such changes cure only a small portion of the evils which have long hedged about American jurisprudence; and it seems so inexcusable to stop short when merely the first steps of reform have been taken, that the good to be derived from having accomplished the first step is perhaps underestimated.

But judicial reform is no longer a problem to be solved only by testing through experience each step as we go; for we have an almost perfect example of modernized courts in the present court system of England, adopted in 1873, and in operation with little change ever since. So students who are ambitious for reform feel justified in being impatient of delay. Of course, the reason for American delay in adopting the new English system as freely as we adopted the old, is that the law makers empowered or charged with the duty to adopt reforms usually give brief study to the subject, and draw their reform bills based upon their own limited experience rather than the experience and thought of the English speaking world.

The English court reform act, known as the "Judicature Act of 1873," was the work of a carefully chosen commission, in which the dominating influences were two former Lord Chan-

cellors, Lord Selborne and Lord Cairns; and the commission took more than four years to formulate its plans. Of course, they created some changes in English judicial administration which will never be generally adopted in America; they even created some changes which English scholars have thought were unwise. But the questionable changes have more to do with procedure than with the structure and organization of the courts. And as a system of courts, the new system they created not only still works satisfactorily in England, but has been accepted as a model by students of reform and critics of common law institutions all over America as well. And while the original plan of reform recommended by the commission was not adopted by Parliament as fully as they prepared it,[15] it is now believed that it should have been adopted in full.[16]

There appears no good reason why the principles recommended by the English Judicature Commission relating to the jurisdiction and organization of the courts, should not be adopted generally in the United States; and their success in England seems to warrant their adoption in substantial entirety at once instead of being adopted in fragments as Americans are now doing. Moreover, as we have no institution in the states corresponding to the appellate jurisdiction of the House of Lords,[17] and that divergence of the present English system from the recommendation of the Judicature Commission can not be followed by us; we might very well go further than the English Parliament and try including all the courts from the highest to the lowest into the unified court, as originally recommended by the English Commission.

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[15] The commission recommended the abolition of the appellate judicial power of the House of Lords, and the incorporation of the county courts in the one supreme court of judicature. The latter recommendation was never adopted; the former was adopted at first, but two years later the appellate judicial power of the House of Lords was restored.

[16] See Professor Roscoe Pound's opinion in his Essay on Organization of Courts, an address delivered at the meeting of the Minnesota State Bar Asso., in 1914. The essay is published in Bulletin VI, of the American Judicature Society.

[17] In the early part of the 19th century the New York Senate had appellate judicial authority, and perhaps the upper chamber of the legislatures of some other states.

It is not practicable to give even an adequate summary of the English Judicature Act in this article, but it will be sufficient for the present discussion to give the crystallized conclusions of a modern critic of it, Professor Roscoe Pound of Harvard, applied as his general recommendations for American adoption. He says: [18]

> "The whole judicial power of each state * * * should be vested in one great court, of which all tribunals should be branches, departments, or divisions. * * * This court should be constituted in three chief branches: (1) county courts or municipal courts; (2) a superior court of first instance; (3) and a single ultimate court of appeal. The first should have exclusive jurisdiction of all petty causes. There should not be a separate judge for each locality. Instead, all the courts with petty jurisdiction should in the aggregate constitute one court, or a branch of the great court, but this branch of the court should have numerous local offices where papers may be filed and as many places for hearing causes in each county as the exigencies of business may require. * * *
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> "The second branch would be a superior court of first instance with a general original jurisdiction at law, in equity, in probate and administration, in guardianship and kindred matters and in divorce. It should also have general criminal jurisdiction. It should have numerous local offices where papers may be filed, and at least one regular place of trial in each county. * * * Some one high official of the court should be charged with supervision of the judicial business of the whole court, and he should be responsible for failure to utilize the judicial power of the commonwealth effectively. * * * The third great branch of the court would be a single court of appeal to which causes might go directly for review upon the law from the county courts or from any division of the superior court. All the judges of the commonwealth should be judges of the whole court."

How superior such a system would be to the average system obtaining throughout America is apparent if we stop for a moment to recall that now every circuit or territorial division of the superior courts in each state is a kingdom to itself. The

[18] Essay on Organization of Courts, *supra*.

judge goes his round and then rests. He cannot be sent to another circuit to help discharge accumulated business unless he chooses to exchange with the judge who is pressed with work, to give him rest for a limited time. If there are more judges than one in the circuit, they are usually confined to separate courts, so that if one is a good judge and the other a poor one, one court is busy and the other is comparatively idle. Appeals to the supreme court are distinctly new actions instituted merely to criticise the record of the trial below, and except in appeals from equity final decrees, can only result, if successful, in having to begin all over again from the start.

If there is an intermediate appellate court, it has limited jurisdiction, and while final in name, merely creates a new chance for appeal.

The basic principles of the reform plan, as applied to a whole state, are, first, the power it gives the presiding officer, the chief justice of the state, he may be called, at any time to marshal the judicial forces of the state to meet the pressure of business in any branch of the courts and in any part of the state; and secondly, that when a suit is once instituted in any branch of the court, it may be retained until it shall be completely disposed of, without a multiplication of trials or a multiplication of records; and it may be shifted from one division to another, and even to the appellate branch for correction or review without being thrown out of court prematurely, and without the formalities and dangers of the present appeals.

This latter principle will be fully appreciated on a clear understanding of the system of divisions. The reorganized court would be divided into at least five divisions, a law division, an equity division, a probate and divorce division, a criminal division, and a court of appeals; and causes would be transferred from one division to another on motion, the appeal being essentially no more than a motion to transfer to another division.

But eliminating appeals, which require more detailed thought than is possible at this time, it is evident that a cause might be begun in equity and end at law, having passed through the jurisdiction of probate or administration, without the parties

ever being discharged from the court until all rights are determined.

It is important too to note that while all sorts of rights may have been involved, including equitable, legal, and administrative, each kind may be determined by a judge who is a specialist in his line. The equity division of the court will be presided over by experienced equity judges, the common law division will be presided over by experienced common law judges, and the probate division, by technically accurate administrative officers And if there is a criminal division, that also would be presided over by judges proficient in criminal law.

Of course, all the judges would be clothed with all jurisdiction, so as to avoid the disaster incident to a judge's mistaking the occasion when he should exercise his functions. But any judge either at his discretion, or on the motion of the parties, would have the power to send the cause to an expert in another division to decide any question that might arise.

Such is the plan of working of the present English system of courts and such is the plan which will certainly be generally adopted throughout America, although we may not see it put into force fully in our day.

Lastly, let us consider briefly the last division of the problem of administrative reform, namely, reforming the methods of judicial administration in the strict sense of the term. By this is meant the methods by which litigation is handled by the courts, rather than the procedure by which litigation is presented to the courts by the attorneys of the parties: for as heretofore stated, the reform of procedure is so large a subject as to require treatment in a separate article. But the inefficient manner in which litigation in our state courts is generally handled by the courts themselves, is perhaps more frequently the real ground of dissatisfaction by the public with our judicial systems than any other one deficiency. It is also the most difficult trouble to discuss and to remedy, from the fact that inefficiency includes all sorts of reasons why the courts do not "work right," and is traceable as frequently to deficient personality in the judges as to troubles in the judicial system; for as Professor Pound observes, "No amount of organization can accomplish much

with incompetent judges, while good judges may sometimes make almost any organization reasonably tolerable." [19]

But inefficiency is chiefly traceable, it may be safely asserted, to various statutory provisions which have come down to us from the last two generations, and to which we have become so accustomed that we may call them social institutions. When our American state constitutions were first drawn, the populations were settled largely, and in some states chiefly, in rural communities; and the provisions for the courts, like those for taxation and every other function of government, were designed in the main to suit the rural population. Travel from point to point was difficult and slow: even business contact between the settlements was infrequent; and two sittings of court a year in the several counties enabled litigation to progress as rapidly as the litigants' opportunities for preparation required. Customs of granting continuances, leave for making amendments, and all the rules of judicial administration were assimilated to the periods of holding court. Now, however, contact even between all parts of the rural districts is comparatively close, and travel has become speedy; and yet we have generally but two terms of court a year in the rural districts, and steps in advancing a cause are made only while the court is in session. Any city lawyer who has tried a closely contested equity case in the rural districts, can testify that not infrequently such cases are protracted from three to five years beyond the time when the case would be finished but for the fact that the court sits but twice in each year.

The inefficient administration of the rural courts is first adverted to because it is not so frequently noted by essayists as the inefficiency of metropolitan courts, although the historic system of statutory provisions under which all our courts are run is responsible for most of the delays in the country courts, as it is for the troubles in town.

The effect of the antequated statutory provisions upon our city courts, is not confined, however, to the delays between hearings and continuances, but appears in the methods of serving process, the drawing and making up of juries, including the

[19] Essay on Organization of Courts, *supra*.

number of challenges allowed the parties and the custom of striking jurors, by which each party strikes alternately from twenty-four jurymen, one at a time, until they are reduced to twelve. It appears also in the usual laws limiting the court's right to charge the jury, and in the methods of examining witnesses with a view to protect the case on appeal. Even the requirement of a verdict of all twelve jurymen may be classed as a worn-out institution. All these time honored legal customs are causes of an inestimable amount of inefficiency in the courts; and yet a large part of the bar and the public still cling to them as to foundations of our Anglo-Saxon liberties, in most instances without being able to trace them beyond the nineteenth century, or the American revolutionary constitutions.

But it is unnecessary to carry the discussion further. Suffice it to say that our courts have grown up in statutory compartments, chained hand and foot; and that until they are released from their unhealthy bonds no mere structural reform will enable them to do their best work.

It is now generally recognized that judicial administration should be regulated as little as possible by fixed statutes imposed by the legislature, and as much as possible by rules promulgated by the judges themselves, who are to work under them. Thus all the regulations just noted above, from the time of holding court to the methods of taking an appeal, including the drawing of juries, the calling and examination of witnesses, the delivery of the charge, the taking exceptions, and every step except perhaps the number of jurymen necessary to render a verdict, might be fixed by the courts as well as by the legislatures, as is done now. And if the courts had the right to make and to change all such administrative rules as experience might dictate, it is evident, not only that the rules would generally conform more closely to the convenience of the litigants and the public, but also that the courts would be more efficient in the proportion that experience is allowed to prompt the immediate correction of rules unwisely made.

Therefore the repeal of all limiting statutes and the turning over to the courts themselves of the power and duty of fixing the methods by which they are to handle and dispose of liti-

gation, is the remedy suggested for increasing the administrative efficiency of our courts. But in considering this proposal it must not be forgotten that until the creation of a unified court —certainly as far as the nisi prius jurisdictions is concerned— the fixing of rules by the judges would be like the erection of a multitude of little legislatures. Substantial uniformity throughout the state in the more important steps in the progress of a cause of action, is equally as desirable as economy of the participants' time. Such matters as the time of holding court the judges of each locality should, of course, decide for themselves; but in many matters it could be only by coöperation between all the judges of the state that a system of administrative rules could be devised which would work over the whole state both impartially and well.

Again, it is only under the unified system of the courts that the system of rules adopted for the whole state could be the result of the experiences of the judges who are to put them in force; for if the rules for the lower courts are to be drawn by the judges of the supreme court alone, as has not infrequently been suggested, the system would have little or no advantage over the present systems of statutory law.

The notion of empowering the supreme courts to supplant the old statutes by rules, has become something of a fetish with many would-be reformers who fail to trace the notion to its logical source. Their idea is of course taken from England and the provisions of the Judicature Acts. But in England these rules are provided by the judges for themselves, since the supreme court judges hold court all over the kingdom; and without adopting that institution of English law also, there would seem to be little good in adopting the plan of allowing the supreme court judges to supplant all the statutory regulations.

With a single unified court, on the other hand, even if the supreme court justices never find time to try cases over the country, the rules made by the whole court would represent rather the experiences of the nisi prius judges who must be largely in the majority, than the mere views of the appellate tribunal alone.

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